

LET THE EUROZONE BE COMPETENT: THE GERMAN FEDERAL CONSTITUTIONAL COURT CONTINUES TO BLESS THE EU

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I. INTRODUCTION

As of this Comment, the world is still grappling with recovery from the 2008 financial crisis that rocked the West and reverberated across the globe. The European Union, a still growing, supranational organization, is coming to grips with just how to react to grave financial crises given its limitations as a federation of sovereign states. The Eurozone in particular, a monetary and fiscally united union within a union,¹ is grappling with its own unique set of financial problems.² Eurozone skeptics have speculated as to whether Greece will either leave the Eurozone on its own cognizance or be forced out. Many fear that the Greek financial problems are systemic, and contagion will spread to other countries that show financial vulnerability.³ Although the problems belong to the European Member States as a whole, one thing is certain: it will be the EU's main power player, Germany, who will shape the roadmap going forward.

Germany is the Eurozone's largest member in both population and economic power;⁴ this makes it a major player in deciding the future of the European Union and Eurozone alike. When German legislation lends its input and influence to shaping EU policy, it is often challenged from within.⁵ This can create a

1. See generally Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter TEU] (establishing the creation of the European Monetary Union).

2. See *The Euro Zone: The World's Biggest Economic Problem*, *ECONOMIST*, Oct. 25, 2014, at 13 (reporting Europe's recession and financial problems, such as deflation).

3. See, e.g., Neil Irwin, *The Contagion Effect: Greece's Debt Crisis Could Spread Across Europe*, *WASH. POST* (May 7, 2010, 3:40 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/07/AR2010050700642.html> (explaining how the fiscal crisis in Greece may spread to countries due to investor uncertainty).

4. *Germany Country Profile*, *BBC NEWS*, http://news.bbc.co.uk/2/hi/europe/country_profiles/1047864.stm (last updated Mar. 19, 2012).

5. See, e.g., Jared Curzan, Comment, *A Critical Linkage: The Role of German Constitutional Law in the European Economic Crisis and the Future of the Eurozone*, 35

headache for EU policy makers who might be able to get legislation enacted but who nonetheless must always deal with the uncertainty that future legislation could be invalidated by the *Bundesverfassungsgericht* (“BVerfG”),⁶ thereby removing German support that may have already been given. Adding to this stress, and perhaps exasperation, is the idea that the European Union was created in a way that allows its Member States to decide policy with a European Court of Justice. This Court was instituted as a judicial watchdog over all Member States,⁷ and it is anathema that the BVerfG should indirectly hold the same power, essentially giving Germany a special veto status.

This Comment attempts to define European policy-making in a more concrete way by showing both the agreeability but yet ultimate authority of the BVerfG in sanctioning EU legislation. It cannot be stated as a matter of fact that the BVerfG considers the political moves of its rulings. However, it has a track record of affirming *Bundestag* EU legislation, which almost always requires German support. This Comment will show that even the latest EU Treaty, the European Stability Mechanism, was given the BVerfG’s green light with minor restrictions on future use of the mechanism.

Part II of this Comment will describe how the European Union enacts legislation that creates mechanisms to deal with crises, e.g., Europe’s debt crisis, as well as lay out a brief history of German constitutional challenges to European crisis legislation. Part III will discuss the European financial crisis generally, and examine Europe’s swift reaction to it by establishing the European Financial Stability Mechanism and European Financial Stability Fund. Part IV will then detail the creation of the European Stability Mechanism, a more permanent solution to the current European financial crisis as well as future crises, and the eventual court rulings by the European Court of Justice, as referred to it by the Irish Supreme Court, and BVerfG that

FORDHAM INT’L L.J. 1543, 1544–87 (2012) (presenting a progressive history of rulings by the German Federal Constitutional Court, the *Bundesverfassungsgericht*, on legislation affecting Germany’s ability to participate in sanctioning EU policies).

6. See *infra* note 87 and accompanying text.

7. *General Presentation*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_6999 (last visited Mar. 21, 2013).

followed. Part V will then examine the contrasting paths taken by the Irish and German Supreme Courts, shedding some light on the shadow cast over the former by the latter. It will attempt to highlight the reality for EU Member States that might wonder about the validity of future Eurozone legislation: practically speaking, all roads lead to the BVerfG. Consequently, it might give some consolation to note that this is not necessarily such a bad thing.

II. BACKGROUND

A. *How Do Divided Countries Form United Solutions?*

Years of cooperation, legislation, and court battles have gone into constructing what is now the European Union.⁸ Members of the EU envisioned a European Economic and Monetary Union (“EMU”) whose goals were, to name just a few, the coordination of economic policies and the implementation of a single currency, allowing for higher efficiency in cross-border trade and purchasing.⁹ In order to facilitate legislation that acts as mechanisms to shape common policy within the Eurozone, the European Council,¹⁰ empowered under the EMU, may craft legislation dealing with financial affairs, such as the EFSM and EFSF.¹¹ Such legislation was enacted to fend off the worsening Euro Crisis originally taking shape in Greece.¹²

The creation of legislative mechanisms is no easy task. The EU’s decision-making process consists of multiple bodies of elected

8. See Curzan, *supra* note 5, at 1544–47 (outlining the creation of the EU and Germany’s legal challenges to its provisions).

9. See generally TEU, *supra* note 1 (laying out the objectives of the EU); see also *Economic and Monetary Union*, EUR. COMMISSION, http://ec.europa.eu/economy_finance/euro/emu/index_en.htm (last updated Aug. 26, 2014) (listing what the EMU represents and the degrees of economic integration).

10. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 1, ¶ 9(c), Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty] (empowering the European Council as a separate EU institution with policy shaping powers).

11. See Boris Ryvkin, Note, *Saving the Euro: Tensions with European Treaty Law in the European Union’s Efforts to Protect the Common Currency*, 45 CORNELL INT’L L.J. 227, 231–32 (2012) (discussing the creation and purpose of the EFSM and EFSF).

12. See *id.* at 231 (outlining the Greek debt crisis and the EU’s response).

and appointed officials, the first of which is the Commission.¹³ The Commission has the power to initiate legislation that it then recommends for adoption by the European Parliament¹⁴ and the Council.¹⁵ The latter two bodies work together to pass legislation.¹⁶ It is worthwhile to note that these three bodies are designed to comprise a broad European demographic.¹⁷ The Commission, which is supposed to represent Europe's interests as a whole, rather than the interests of individual Member countries,¹⁸ is headed by a president who is nominated by the

13. See John F. Mogg, *Regulating Financial Services in Europe: A New Approach*, 26 *FORDHAM INT'L L.J.* 58, 62 (2002) (laying out the structure of the EU's decision-making process); see also *About the European Commission*, EUR. COMMISSION, http://ec.europa.eu/about/index_en.htm (last updated June 1, 2015) (laying out the functions of the European Commission, which include proposing legislation for the European Parliament and the Council of Ministers to adopt, enforcing European law, and setting objectives and priorities for action).

14. See *European Parliament*, EUR. UNION, <http://europa.eu/about-eu/institutions-bodies/european-parliament> (last visited Mar. 25, 2015) (laying out the functions of the European Parliament); see also Mogg, *supra* note 13, at 62 (describing the Commission's exclusive right to initiate legislation that the European Parliament then adopts).

15. See *Council of the European Union*, EUR. UNION, http://europa.eu/about-eu/institutions-bodies/council-eu/index_en.htm (last visited Mar. 25, 2015) (laying out the functions of the Council of the European Union); see also Mogg, *supra* note 13, at 62 (setting out the EU's decision-making process). To clarify, the Council of the European Union is also referred to as simply the Council or the Council of Ministers. See *The Council of the European Union*, CVCE (Sept. 11, 2012), http://www.cvce.eu/obj/the_council_of_the_european_union-en-de23700c-e50a-4e0e-a7de-80665e4caf9f.html (noting the creation of the Council of the European Union in 1992 consisting of representatives at the ministerial level); see also *The Council of the European Union (Council of Ministers)*, CIVITAS, <http://www.civitas.org.uk/eufacts/download/IN.3.Council%20of%20the%20European%20Union.pdf> (last visited Mar. 8, 2015) (noting the Council of the European Union is commonly called the Council of Ministers).

16. See *EU Institutions and Other Bodies*, EUR. UNION, <http://europa.eu/about-eu/institutions-bodies> (last visited Feb. 12, 2015) (explaining the law-making process).

17. See generally *id.* (defining the EU's setup). This was the intent but the reality is perhaps something different. See Nicolas Véron, *How Unequal is the European Parliament's Representation?*, BRUEGEL (May 16, 2014), <http://www.bruegel.org/nc/blog/detail/article/1334-how-unequal-is-the-european-parliaments-representation> (questioning the European Parliament's equality of representation). In any case, this topic is beyond of scope of this Comment.

18. See *Governance Statement of the European Commission*, COMMISSION EUR. COMMUNITIES (May 30, 2007), http://ec.europa.eu/atwork/synthesis/doc/governance_statement_en.pdf (stating the purpose of the European Commission); see also EUR. COMMISSION, *supra* note 13 (defining who the European Union represents).

Council and then approved by a majority vote of the European Parliament.¹⁹ The president then selects the commissioners from a list of candidates put forth by EU countries and submits them for approval by the Council and then the EU Parliament, followed by official appointment by the Council to serve five-year terms.²⁰

The exclusive right of the Commission to initiate EU legislation stems from an attempt to balance the interests of the EU as a whole.²¹ This was meant to facilitate further EU integration.²² The EU is made up of a union of countries, some of them much larger than the others. As such, the Commission was meant to give equal representation to Member States, regardless of size, as opposed to the Parliament to which nationals are elected based on proportions of their population.²³

The Council, on the other hand, is comprised of governmental representatives from the Member States.²⁴ This body is made up of the heads of EU Member States, along with the president of the Commission and a permanent Council President.²⁵ The focus of representation, therefore, is to represent the interests of Member States, unlike the Commission which was designed to represent the EU as a whole. The Council ministers have many responsibilities, such as passing EU laws, signing agreements

19. See EUR. COMMISSION, *supra* note 13 (describing how the President of the Commission is elected).

20. *Id.*

21. See Youri Devuyt, *The European Union's Institutional Balance After the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed*, 39 GEO. J. INT'L L. 247, 264 (2008) (stating that the European Commission's exclusive right of legislature was meant to ensure the promotion of the general interests of the European Union, and not individual Member States).

22. See *id.* (facilitating integration by protecting minority Member States from larger Member States).

23. See *id.* (protecting the interests of smaller Member States); see also EUR. UNION, *supra* note 14 (laying out the organization of the European Parliament). In a way, this can be illustrated as mimicking the balance of power provided by the American Congress, which is composed of a Senate, giving equal representation to the states, and a House, giving states representation based on population size. See U.S. CONST. art. I, §§ 1–3 (laying out the makeup and functions of the United States Congress).

24. EUR. UNION, *supra* note 15. There is one Council minister elected from each Member State who is empowered to act as an agent of his government for decision-making purposes. Mogg, *supra* note 13, at 62.

25. See Lisbon Treaty, *supra* note 10, art. 1, ¶ 16 (inserting a new TEU art. 9B(2)).

with non-EU countries, approving the EU budget, and coordinating broader policies among the Member States.²⁶ There are ten different configurations in which the Council ministers sit, each based upon the topic to be discussed, one of which is the Finance Ministers Council (“ECOFIN”).²⁷ This is done by countries sending council members who are government ministers in the area of policy to be discussed.²⁸ Meetings are chaired by the minister belonging to the country that holds the EU presidency.²⁹ Currently, a qualified majority is required for the Council to approve a decision.³⁰

It is the job of the Council to define the broad guidelines under which the European Community will function, including policies dealing with economics and defense, as well as crafting treaty reform and setting a framework for the accession of new Member States.³¹ The Lisbon Treaty, which expanded the powers of the Council, calls for the Council to define the guidelines dealing with implementing legislation.³² This last aspect dealing with legislation seemingly forces the Commission to work within a framework set by the Council.³³

26. EUR. UNION, *supra* note 15.

27. *See Council Configurations*, COUNCIL EUR. UNION, <http://www.consilium.europa.eu/en/council-eu/configurations> (last visited Feb. 12, 2015) (noting the 10 configurations); *Ecofin Council*, CESIFO, <http://www.cesifo-group.de/ifoHome/facts/Aktuelles-Stichwort/Topical-Terms-Archive/Ecofin.html> (last updated Feb. 24, 2015) (stating that the ECOFIN Council is one of the configurations of the Council). The Council may sit as the ECOFIN Council to regulate and administer financial policy under its jurisdiction. *Id.*; *see also Economic and Finance Affairs in the EU*, EURONET, <http://www.erionet.org/site/basic100049.html> (last visited Feb. 12, 2015) (providing the European Central Bank sets monetary policies for the euro, and the Economic and Financial Affairs Council oversees policy areas related to the European Union’s economy, including the euro).

28. *See* EUR. UNION, *supra* note 15.

29. *Id.* (noting an exception for the foreign ministers’ Council that has a permanent chairperson).

30. *Id.*

31. *See* Devuyt, *supra* note 21, at 269–70 (laying out the duties of the Council).

32. *See id.* at 270–71 (noting the Lisbon Treaty imposes a duty on the European Council to define guidelines for legislative planning).

33. *Id.* at 271. Devuyt draws an inference here that the Council indirectly restrains how the Commission may work because the Lisbon Treaty charges it to “define[] the strategic guidelines for legislative and operational planning.” *See id.* (commenting that the Commission will have to “work *within* the legislative planning framework established by the European Council”).

Council decisions are made by voting, except where treaties provide for exceptions.³⁴ As previously noted, a qualified majority vote is required.³⁵ This is increased to a supermajority when a vote is taken on a resolution not proposed by the Commission.³⁶ This does not mean that minority members are completely without recourse. A minority of Member States can vote to delay passage of a decision in order to prolong negotiations so that a state's vital interests may be more fully considered.³⁷ Treaties, however, require a much higher standard for amendments to be made: a "common accord" made within an Intergovernmental Conference, signatures of all Member State governments, and ratification by all Member States in accordance with their respective constitutional requirements.³⁸

While the Council is representative of national governments in the EU, the members of the European Parliament are elected directly by EU voters to serve five-year terms.³⁹ Essentially, this chamber was meant to be co-decisive with the Council.⁴⁰ Within the Parliament, members represent a political persuasion rather than a national identity.⁴¹ Each Member State is given a set number of seats that are up for election which are proportioned according to Member States' populations.⁴² The Parliament must be in agreement with the Council on the exact legislative text

34. See EUR. UNION, *supra* note 15 (laying out the Council's voting process); see also *The Council of the European Union*, EUROPA, http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0008_en.htm (last updated Dec. 24, 2009) (noting the Council acts by qualified majority unless treaties require otherwise).

35. Devuyt, *supra* note 21, at 279–80.

36. See *id.* at 280 (defining "supermajority" as a vote in support of the decision by at least two-thirds of the Member States, and also that this majority represents at least 62% of the Union's population).

37. *Id.* at 281–82 (laying out the Ioannina compromise).

38. *Id.* at 273 (laying out the requirements to amend treaties).

39. See Mogg, *supra* note 13, at 62–63 (noting representatives are elected every five years through direct suffrage of citizens).

40. See Devuyt, *supra* note 21, at 303–04 (quoting former German President Richard von Weizsäcker, former Belgian Prime Minister Jean-Luc Dehaene and former British Minister David Simon on the purpose of the EU parliament in an democratic society).

41. *Id.* at 304.

42. *Id.* at 305–06.

before it is passed, and passage requires the signatures of presidents from both the Parliament and Council.⁴³

Furthermore, the EU follows the guiding principle of subsidiarity, to maintain limits on the EU's competences, and national parliaments "must see to it that the principle of subsidiarity is respected."⁴⁴ This principle calls for EU action on legislation only when local or state actions are insufficient to achieve the desired effect.⁴⁵ Ordinary draft legislation must be reviewed when a simple majority vote of the member parliaments believe "the draft does not comply with the principles of subsidiarity," after which the Commission may choose to maintain, amend, or withdraw the legislation.⁴⁶ However, these votes are non-binding on the Commission, which ultimately may decide to move the legislation through the other two chambers if it wishes.⁴⁷ In a way, this is merely an evaluation mechanism to ensure that the legislation at hand is properly before the EU.⁴⁸

The process of amending EU Treaties, however, follows a different protocol. There are now two ways in which EU treaties may be amended: the ordinary method and the simplified method.⁴⁹ Under the ordinary or main method, proposals to amend treaties may be submitted to the Council by the EU Parliament, the Commission, or the Member States themselves.⁵⁰

43. *Id.* at 307.

44. *Id.* at 312; *see also* Consolidated Version of the Treaty on European Union art. 5(1), 5(3), Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter Consolidated TEU] (explaining how Union competences are limited by the principle of subsidiarity).

45. Consolidated Version of the Treaty on the Functioning of the European Union art. 5(3), Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter Consolidated TFEU]; *see also* Lisbon Treaty, *supra* note 10, art. 1(6) (inserting a new TEU art. 3b(3) defining the role of subsidiarity in the European Union).

46. Devuyst, *supra* note 21, at 312.

47. *Id.* at 312–13.

48. *Id.* at 312 (noting that the Lisbon Treaty calls for "a procedure that allows national parliaments to intervene during the legislative process on grounds of subsidiarity").

49. Lisbon Treaty, *supra* note 10, art. 1(56) (inserting a new TEU art. 48(1)). These two procedures were brought about after the Lisbon Treaty changed the game by softening the requirements for amending treaties. *See* GAVIN BARRETT, FIRST AMENDMENT? THE TREATY CHANGE TO FACILITATE THE EUROPEAN STABILITY MECHANISM 5 (2011) (noting that before the treaty of Lisbon, there was only one method of amending treaties).

50. Lisbon Treaty, *supra* note 10, art. 1(56) (inserting a new TEU art. 48(2)).

National parliaments are to be notified of amendments under consideration and shall be invited to participate if a Convention is called.⁵¹ Review of proposals is then made during a Convention called after a majority vote of the Council.⁵² The Convention is meant to facilitate a consensus on the proposal and is composed of representatives of Member States, heads of Member State governments, the Commission, the Parliament, and when concerning economic issues, representatives of the European Central Bank.⁵³ Once the President of the Council convenes a conference of representatives of the Member States' governments on proposals submitted from the aforementioned Convention, the amendment is passed after ratification by all the Member States "in accordance with their respective constitutional requirements."⁵⁴ It should be noted that only six of the seven parts of the Treaty on the Functioning of the European Union actually require the application of the ordinary amendment procedures for revision.⁵⁵

Under the simplified amendment procedures, proposals may be submitted to the Council by the Parliament, Commission, or Member States.⁵⁶ This process is used to revise or amend all or part of Part Three of the Treaty on the Functioning of the European Union relating to Union policies and actions.⁵⁷ The Council is charged to act by unanimity after consulting with the Parliament, Commission, and European Central Bank should the proposals be economic in nature and affect the Eurozone.⁵⁸ According to the simplified procedure, national parliaments may oppose amendments, stopping the Council from adopting them.⁵⁹ Again, Member States must give final approval after considering the proposals under their national constitutions.⁶⁰ What cannot

51. Devuyt, *supra* note 21, at 313–14.

52. Lisbon Treaty, *supra* note 10, art. 1(56) (inserting a new TEU art. 48(3)).

53. *Id.*

54. *Id.* art. 1(56) (inserting a new TEU art. 48(4)).

55. BARRETT, *supra* note 49, at 8.

56. Lisbon Treaty, *supra* note 10, art. 1(56) (inserting a new TEU 48(6)).

57. *Id.*

58. *Id.*

59. Devuyt, *supra* note 21, at 314.

60. BARRETT, *supra* note 49, at 10.

be authorized under the simplified amendment procedures are increases to Union competences as conferred by the treaties.⁶¹

Lastly, concerning the EU institutions, relevant to amending treaties by weighing in on the actions taken by those institutions, is the European Court of Justice (“ECJ”).⁶² The ECJ was created to watch over the Member States and ensure the correct interpretation and application of the treaties.⁶³ Reflecting the court’s impartiality, the ECJ is composed of one member from each Member State.⁶⁴ It is tasked with reviewing the legality of acts passed by EU institutions, ensuring that Member States comply with their obligations under the treaties, and interpreting EU treaties on behalf of national courts and tribunals.⁶⁵ In order to facilitate a standard interpretation of EU laws, countries may approach the ECJ for a preliminary ruling, basically advice as to how a law should be interpreted.⁶⁶ In order to ensure that countries are upholding their obligations, proceedings may be brought by the Commission to the court for enforcement.⁶⁷ The ECJ may also annul laws that are found illegal if challenged by the Council, Parliament, Commission, or any Member State, as well as private individuals who believe a law has infringed on their personal rights or has affected them in an adverse manner.⁶⁸

B. Can the EU Be More Competent than the Sum of Its Parts?

At the heart of the treaties, what gives the EU institutions the ability to exist and to act as it does is the competence that is

61. *Id.* at 10–11; *see also* Consolidated TFEU, *supra* note 45, art. 5(2) (stating that the Union can only act within the competences conferred upon it by the treaties).

62. *See* CURIA, *supra* note 7 (noting the purpose of the ECJ to make sure the law is observed in the interpretation and application of treaties).

63. *Id.*

64. *Court of Justice of the European Union*, EUR. UNION, <http://europa.eu/about-eu/institutions-bodies/court-justice> (last visited Feb. 14, 2015) (laying out the composition of the ECJ).

65. CURIA, *supra* note 7.

66. *See* EUR. UNION, *supra* note 64 (noting the preliminary ruling procedure of the ECJ).

67. *Id.*

68. *Id.*

transferred to it from its Member States.⁶⁹ The Lisbon Treaty helped to clarify the boundaries of EU competences by identifying three distinct types: exclusive competences, shared competences, and supporting competences.⁷⁰ Exclusive competences are specific areas where only the EU can legislate and set policy, such as monetary policy for Eurozone Member States.⁷¹ Shared competences are areas shared between the EU and Member States not related to areas referred to in TFEU Articles 3 and 6, such as the internal market and energy.⁷² The third type of competence, supporting competences, are areas where the EU may support, coordinate, and supplement the actions of Member States, such as in protection and improvement of human health, industry, and administrative cooperation.⁷³ Additionally, the EU is granted special competences in order to set policies, not legislation, in a variety of areas, including the coordination of economic and employment policies.⁷⁴

There are three fundamental principles that maintain limits and facilitate the goals of granting the EU such powers: the principle of conferral, the principle of proportionality, and the principle of subsidiarity.⁷⁵ The first two will be discussed here as the third, subsidiarity, was already mentioned. The principle of conferral limits the actions of the Union to those licensed it solely by the treaties via the Member States.⁷⁶ All other competences not granted the Union remain with the Member States.⁷⁷ Secondly,

69. See *Division of Competences Within the European Union*, EUROPA, http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm (last visited Mar. 23, 2010) (stating that “the Union has only the competences conferred upon it by the Treaties”).

70. *Id.*

71. See Consolidated TFEU, *supra* note 45, art. 3 (noting several areas in which the EU has exclusive competence).

72. *Id.* art. 4.

73. *Id.* art. 6.

74. See *id.* arts. 5, 352 (granting special competences to coordinate economic and employment policies within the Union and creating the so-called “flexibility clause” by granting the EU the ability to act beyond its own power if required to achieve its objective); see also TEU, *supra* note 1, art. J.8 (granting the EU competences to set common foreign and security policy).

75. EUROPA, *supra* note 69.

76. Consolidated TEU, *supra* note 44, art. 5(2).

77. *Id.*

there is the principle of proportionality.⁷⁸ Under this principle, the actions taken by the Union shall not exceed what is necessary to achieve the desired goal of the Treaty.⁷⁹

C. The German Constitution: Barrier or Bridge?

When the German Constitution, the Basic Law (Grundgesetz (“GG”)), was crafted in 1949 as a way of governing Western Germany after the Second World War, many did not think that it would endure as the celebrated and lasting document that governs modern Germany today.⁸⁰ In addition to creating the rule of law in the modern German State, it also gave rise to the BVerfG, a court said to be as influential and respected as the United States Supreme Court, with far-reaching powers of judicial review.⁸¹ Unlike the United States Supreme Court and judicial system, the BVerfG is the single court that reviews matters concerning constitutional questions as well as a limited set of public-law controversies.⁸² The GG specifically lays out the jurisdiction of the BVerfG.⁸³ In addition to the list of potential cases laid out in the GG for constitutional review, the BVerfG may also issue temporary injunctions.⁸⁴ For various reasons, this has become an increasing function of the BVerfG.⁸⁵ These proceedings differ from the Court’s normal judicial review because they involve enjoining measures that might have a

78. *Id.* art. 5(4).

79. *Id.*

80. DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 1 (3d ed. 2012).

81. *Id.*

82. *Id.* at 3. (explaining that a factor that contributed to assigning constitutional judicial review to the single court was the complex German court system that consists of a wide array of specialized courts to deal with all matter of issues).

83. *Id.* at 10. The Court may hear cases concerning: forfeiture of basic rights, constitutionality of political parties, review of election results, impeachment of the federal president, disputes between high state organs, abstract judicial review, federal-state conflicts, individual constitutional complaints, municipal constitutional complaints, other disputes specified by law, removal of judges, intrastate constitutional disputes, concrete judicial review, public international law actions, state constitutional court references, and applicability of federal law. *Id.*

84. KOMMERS & MILLER, *supra* note 80, at 13.

85. *Id.*

stifling effect on the Court's future ability to rule on a matter, effectively rendering the GG defenseless.⁸⁶

Although domestic measures may certainly be enjoined, the BVerfG has been confronted with a host of supranational measures involving treaties passed by the EU.⁸⁷ These latter challenges came to a head via the *Solange*⁸⁸ (German for "so long as") cases, culminating in approval for the passage of the Treaty on European Union ("TEU").⁸⁹ This Treaty called for an amendment to the GG allowing for competencies to be transferred to the new, supranational institutions.⁹⁰ The challenges to the TEU from within Germany concerned core principles of the GG, such as whether the German *Länder*⁹¹ would be affected in their ability to pass legislation, essentially reflecting concern about Germany's functioning as a free and social federal state and threatening to interfere with its sovereignty.⁹² This concern is well articulated in Article 20 of the GG, which states that the

86. *Id.*

87. See generally Dieter H. Scheuing, *The Approach to European Law in German Jurisprudence*, 5 GERMAN L.J. 703, 708–10 (2004) (outlining the major German Constitutional Court cases dealing with possible conflicts between EU legislation and the GG).

88. See generally Curzan, *supra* note 5, at 1550–56 (discussing the details of the *Solange* cases, which involve the application of European regulations to German citizens and the interplay of European law and German constitutional law). The *Solange* cases play out the relationship between the BVerfG's assent to EU treaties while maintaining some sort of ultimate right of review. Basically, the BVerfG has decided that as long as the EC maintains the same standard of rights as granted to the German people under the GG, EC treaties would be held as constitutional under the GG. *Id.*

89. Kevin D. Makowski, Comment, *Solange III: The German Federal Constitutional Court's Decision on Accession to the Maastricht Treaty on European Union*, 16 U. PA. J. INT'L L. 155, 155–57 (1995). The TEU, or Maastricht Treaty, as it was signed in Maastricht, the Netherlands, was enacted in order to bring Europe's economic and political arenas closer. *Id.* at 157.

90. *Id.* at 159–60. This change took place by passing a new Article 23 to the GG that in effect enabled certain powers to be transferred from Germany to the new European institutions. *Id.* at 160.

91. There are sixteen German *Länder*, or states, that make up the Federal Republic of Germany. The Federal Republic is the sovereign state of Germany, and federal laws take precedence over the *Länder*. *Competencies of the German Federation and the Länder*, DEUTSCHER BUNDESTAG, http://www.bundestag.de/htdocs_e/bundestag/function/legislation/competencies.html (last visited Dec. 31, 2014).

92. Makowski, *supra* note 89, at 161.

power of the federal state emanates from the people⁹³ and also preserves the GG's protection of future generations who may decide their own destiny through the GG's separation of powers.⁹⁴

III. THE CRISIS ZONE

A. *The Euro Crisis*

When the European debt crisis first hit, it initially materialized as a possible sovereign debt default by Greece.⁹⁵ In October 2009, the Hellenic Republic announced that its budget figures were incorrectly reported.⁹⁶ It was already running a large deficit which it revealed was 12.7% of its GDP as opposed to the 6% it had previously reported.⁹⁷ This was due to, among other factors: financing "high entitlement and age-related spending, poor tax administration and a bloated public sector."⁹⁸ Finally, Greece sought financial help in April 2010.⁹⁹

93. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.). art. 20(2) [hereinafter GG].

94. See *id.* art. 20a (noting the state is required to be mindful of its responsibility toward future generations).

95. See Jason B. Gott, Comment, *Addressing the Debt Crisis in the European Union: The Validity of Mandatory Collective Action Clauses and Extended Maturities*, 12 CHI. J. INT'L L. 201, 203–04 (2011) (stating that as several European countries faced solvency issues in 2010, Greece was the country of greatest concern and eventually became the first EU Member State to suffer financial collapse). This was not the only country in trouble, just the most immediate concern at the time. *Id.*; see also *The Sovereign Debt Crisis: A Modern Greek Tragedy*, CENT. BANKER, Summer 2012, at 1 (stating that the debt problems that emerged in Greece eventually magnified into Europe's sovereign debt crisis).

96. See Hannes Hofmeister, "All for One . . ."—A Legal Analysis of the European Financial Crisis, 18 NEW ENG. J. INT'L & COMP. L. 129, 130 (2012) (stating that the Greek crisis started in October 2009 when the newly elected Greek government announced that budget figures provided by its predecessor were incorrect); see also Lauren Macias, Comment, *The Greek Debt Crisis: The Weaknesses of an Economic and Monetary Union*, 14 DUQ. BUS. L.J. 251, 266–67 (2012) (detailing Greece's financial struggles upon entering the Eurozone until present, including a 2004 Eurostat financial audit that brought attention to the possibility that Greece might be cooking its books).

97. Hofmeister, *supra* note 96, at 130.

98. *Id.* (quoting WILLEM BUTER & EBRAHIM RAHBARI, CTR. FOR ECON. POLICY RESEARCH, GREECE AND THE FISCAL CRISIS IN THE EUROZONE 3 (2010)).

99. Macias, *supra* note 96, at 267.

There were a number of reasons for the EU to jump in and attempt to solve the problem; among the top concerns were the dangers to French and German banks as Greece's top creditors, the preservation of the Euro as a common currency for all Eurozone Member States,¹⁰⁰ and fear of a spillover effect to other EU economies that had been hurting for some time.¹⁰¹ Greek support initially took the form of Eurozone and International Monetary Fund ("IMF") cooperation leading to a €140 billion loan package with minor austerity measures expected.¹⁰² What soon followed were successive bailout loans with increasingly stringent austerity measures, angering all parties involved as Greece's government and populace pushed back against the measures and European officials became increasingly agitated over Greece's declining economy.¹⁰³ Although measures were being taken both inside and outside of Greece to stop the hemorrhaging, it is also worthwhile to note that Greece was not the only Eurozone Member State in financial distress.¹⁰⁴

Portugal, Ireland, Italy, and Spain (other financially weak EU states in addition to Greece, together making up EU's "PIIGS")¹⁰⁵ were dealing with rising deficits far exceeding their maximum allowances under Eurozone standards at the time Greece was being confronted.¹⁰⁶ Ireland had been dealing with its own crisis since 2008, which entailed its government deficit

100. Hofmeister, *supra* note 96, at 129.

101. Gott, *supra* note 95, at 204.

102. See Ryvkin, *supra* note 11, at 230–31 (noting that the EU contributed €110 billion and the IMF contributed €30 billion).

103. See Macias, *supra* note 96, at 267–68 (detailing the events surrounding the second bailout loan provided to Greece, which included European anger over Greek failures to live up to austerity promises made for its first bailout loan, concomitant austerity measures implemented by Greece, and resulting political and social unrest amongst the Greek populace).

104. See Caroline Jensen, Comment, *What Doesn't Kill Us Makes Us Stronger: But Can the Same Be Said of the Eurozone?*, INT'L LAW., Summer 2012, at 759, 760–63 (noting signs of economic distress or dysfunction in Ireland, Spain, Italy, and Portugal).

105. See Nouriel Roubini & Stephen Mihm, *Can Europe Be Saved?*, SLATE (May 16, 2011, 4:12 PM), http://www.slate.com/articles/business/project_syndicate/2011/05/can_europe_be_saved.single.html (defining the term "PIIGS").

106. See *id.* (noting that Portugal, Ireland, Italy and Spain, in addition to Greece, face increasingly unsustainable levels of both public and private debt).

ballooning from 14.5% of its GDP in 2009 to 32% in 2010.¹⁰⁷ The EU stepped in to some degree here to arrange a bailout in exchange for austerity measures, which Ireland has seemed to implement well; as of 2011 it met its target of reducing its budget deficit to 9.4% of its GDP and continues to make progress.¹⁰⁸ On the other hand, Spain, a much larger Eurozone economy, seemed to have managed to stave off a major financial crisis that it was headed towards.¹⁰⁹ It was able to do this by imposing austerity measures on itself, making both “sweeping tax hikes and spending cuts.”¹¹⁰ Similar economic conditions present in Italy and Portugal and, to a lesser degree, in non-PIIGS nations,¹¹¹

107. See Paul Waldie, *Why Ireland's Recovery May Not Be Sustainable*, GLOBE & MAIL (Jan. 19, 2014 8:59 PM), <http://www.theglobeandmail.com/report-on-business/international-business/european-business/ireland-is-its-recovery-sustainable/article16402437> (noting that Ireland was hit by a financial crisis in 2008, which led to the economy shrinking, housing prices falling, and the banking system nearly collapsing); see also *Irish Deficit Balloons After New Bank Bail-Out*, BBC NEWS (Sept. 30, 2010, 1:54 PM), <http://www.bbc.com/news/business-11441473> (noting that the Irish government had previously committed to bringing its budget deficit down from 14.3% of its GDP, however in 2010 the budget deficit ballooned to 32% of its GDP).

108. See Conor Humphries, *Ireland Troupes Its 2011 Deficit Target*, REUTERS (Apr. 23, 2012, 12:27 PM), <http://uk.reuters.com/article/2012/04/23/uk-ireland-deficit-idUKBRE83M0K320120423> (noting that Ireland beat the budget deficit target for 2011 set under its EU bailout, as the country's underlying deficit for the year was 9.4% of GDP, compared to the 10.6% target).

109. See Giles Tremlett, *Spain Staves Off Bailout—for Now*, GUARDIAN (Apr. 7, 2011, 3:43 PM), <http://www.theguardian.com/world/2011/apr/07/spain-bailout> (quoting a Spanish finance minister who insists that the risk of economic contagion can be absolutely ruled out).

110. See *Spain Braces for Austerity Budget to Avoid Full Bailout*, TELEGRAPH (Sept. 27, 2012, 8:18 AM), <http://www.telegraph.co.uk/finance/financialcrisis/9569851/Spain-braces-for-austerity-budget-to-avoid-full-bailout.html> (noting some of the austerity reforms that the Spanish government has preemptively taken in order to avoid an economic crisis including public sector wage freezes, new taxes, and restrictions on early retirement). It is noteworthy that as of December 31, 2013, Spain had made a successful exit from the ESM financial assistance program. Spain's exit was made just one year after receiving the aid package. *Spain Successfully Exits ESM Financial Assistance Programme*, EUR. STABILITY MECHANISM (Dec. 31, 2013), <http://www.esm.europa.eu/press/releases/spain-successfully-exits-esm-financial-assistance-programme.htm>.

111. See Roubini & Mihm, *supra* note 105 (noting that Italy and Portugal, like Spain, are burdened with increasingly unsustainable levels of public and private debt as well as rising borrowing costs); see also Terry White, *The Effect of the Eurozone Crisis*, MODVIVE (May 19, 2013), <http://www.modvive.com/2013/05/19/the-effect-of-the-eurozone-crisis> (noting that “even powerhouses like France and Germany are disproportionately

have given cause for the Eurozone to seek a more stable mechanism to handle future Member State sovereign debt crises.¹¹²

The involvement of the European banking system only helped to exacerbate the situation in its relationship with the Member States.¹¹³ The relationship between Member States and banks was thus: EU Member “[S]tates relied on banks as investors in their debt, and when banks faced difficulties, they looked to [Member S]tates to bail them out.”¹¹⁴ The Eurozone at the time was governed by the European Central Bank (“ECB”), which had limited powers to coordinate economic policy and could not regulate banks.¹¹⁵ The two were so intimately intertwined because banks would invest in sovereign debt while fully relying on that sovereign’s credit rating, rather than making an independent assessment of the risk associated with the debt.¹¹⁶ In this way, the sovereign debt crisis was able to infect the EU banks and vice versa, further affecting the Member State’s ability to borrow.¹¹⁷ This problem spread quickly to the entire Eurozone, demonstrating how intricately interconnected Member States are.¹¹⁸

B. Rough Drafts to a More Permanent Solution

In order to “calm financial markets” and spur Member States’ with failing economies into recovery, the EU established the

affected by the declining economies of member countries”).

112. *European Stability Mechanism (ESM)*, EUR. STABILITY MECHANISM, <http://www.esm.europa.eu/pdf/FAQ%20ESM%20041020121.pdf> (last visited Feb. 16, 2015) (stating the purpose of the European Stability Mechanism, enacted in 2012, is to provide stability support through financial assistance instruments to ESM Member States experiencing, or threatened by, severe financing problems).

113. See Caroline Bradley, *From Global Financial Crisis to Sovereign Debt Crisis and Beyond: What Lies Ahead for the European Monetary Union?*, 22 *TRANSNAT’L L. & CONTEMP. PROBS.* 9, 12 (2013) (describing the institutional constraints of the EU that impede the speed of change in reaction to crisis).

114. *Id.*

115. *Id.* at 13.

116. *Id.* at 26.

117. *Id.*

118. See *id.* at 26–27 (noting the interdependence of Eurozone countries based upon the single currency).

European Financial Stability Facility (“EFSF”) and the European Financial Stability Mechanism (“EFSM”).¹¹⁹ The EFSF was incorporated in Luxembourg as an entity that could provide financial support when needed.¹²⁰ There is a formal application process that Member States need to go through in order to qualify for and receive funds.¹²¹ Through this process, the Commission has negotiating power to agree to provide funds through the EFSF in return for financial planning and austerity measures.¹²² The mechanism allows for Member States that act as guarantor to guarantee the loans,¹²³ something they typically cannot do on their own due to their status as Member States as proscribed in EU treaties.¹²⁴ The IMF also agreed to work in conjunction with the EFSF to create a powerful Eurozone mechanism with initial capital guarantees of €440 billion, which was eventually expanded to €780 billion; this ultimately provided a lending capacity of €440 billion.¹²⁵

The EFSM was created and approved by the Eurozone countries.¹²⁶ Unlike the EFSF, it may function to aid all EU

119. Curzan, *supra* note 5, at 1562.

120. See Hofmeister, *supra* note 96, at 137–38 (defining and laying out the objectives of the EFSF).

121. *Id.* at 138 (describing the process, which also requires filing a Memorandum of Understanding with the EU Commission).

122. See *id.* (noting the Commission’s Memorandum of Understanding will set out the budgetary and economic conditions with which the borrower must comply); see also Jensen, *supra* note 104, at 762–63 (“The EFSF is empowered to provide loans to EU nations in trouble, buy bonds on the market, indirectly refinance banks via loans to governments, and issue its own bonds.”).

123. See Ryvkin, *supra* note 11, at 232 (stating the loans are backed by “irrevocable and unconditional” guarantees from Member States).

124. See *id.* at 242 (noting that TFEU Article 125 prohibits such actions); see also Consolidated TFEU, *supra* note 45, art. 125(1) (barring Member States from incurring liabilities as guarantors of loans to other Member or Non-Member Nations).

125. See *European Financial Stability Facility (EFSF)*, EUR. FIN. STABILITY FACILITY 1, 3 (Jan. 21, 2013), http://www.efsf.europa.eu/attachments/faq_en.pdf (describing EFSF’s scope of activity and commitments).

126. See Ryvkin, *supra* note 11, at 231–32 (stating the European Council established the EFSM, and to complement the EFSM, the Eurozone Member States created the EFSF); see also *European Financial Stabilisation Mechanism (EFSM)*, EUR. COMMISSION, http://ec.europa.eu/economy_finance/eu_borrower/efsm/index_en.htm (last visited Mar. 10, 2015) (stating the EFSM allows the European Commission to provide financial assistance to EU Member States).

Member States and not just those in the Eurozone.¹²⁷ The EFSM was created with a more immediate future; rather than serve as a permanent mechanism, its purpose was to come to the rescue of Eurozone Member States that were suffering exceptional circumstances beyond their control.¹²⁸ Member States linked the 2008 financial crisis to countries like Greece and Ireland as a basis for calling on EFSM funding.¹²⁹ The fund has the capacity to raise €60 billion from EU Member States to be used quickly as emergency funding.¹³⁰ Formal application is also required. Discussions are held with the Commission and European Central Bank. The Council must give final approval to a submitted draft of an economic and financial adjustment program that was forwarded by a majority of the Commission before the funds are distributed.¹³¹

Both bailout mechanisms depend on significant contributions from Eurozone Member States.¹³² Because Germany is the largest contributor, German euro skeptics were able to take advantage of the BVerfG's procedural right to review to challenge the EFSF as undermining the GG in an effort to kill the facility.¹³³ The complainants alleged that Germany's agreement to fund the expensive bailouts as well as to commit to future obligations effectively hindered the German people's rights to retain power via the *Bundestag*.¹³⁴ This was a significant attack on the treaty because Germany had effective veto power over the treaty.¹³⁵ On

127. EUR. FIN. STABILITY FACILITY, *supra* note 125, at 7.

128. See Ryvkin, *supra* note 11, at 235 (noting that the reason for the qualification of exceptional circumstances beyond a Member State's control is required to satisfy TFEU Article 122(2)).

129. *Id.*

130. Hofmeister, *supra* note 96, at 136.

131. *Id.* at 136–37.

132. See Curzan, *supra* note 5, at 1564–65 (“As the economic crisis in the Eurozone unfolded, Member States provided funds and guarantees to protect other Eurozone members from defaulting.”).

133. *Id.* at 1565–66.

134. *Id.* at 1566–67. See generally DEUTSCHER BUNDESTAG, http://www.bundestag.de/htdocs_e/ (last visited Apr. 1, 2015) (identifying the parliament of the Federal Republic of Germany).

135. See Curzan, *supra* note 5, at 1570–71 (discussing the *Bundestag*'s budget committee's veto power over future activation of the EFSF, which may lead to the loss of German funding to struggling Member States resulting in defaults for those States).

September 7, 2011, the Court did support Germany's ratification of the treaty, but laid out certain conditions.¹³⁶

The BVerfG approved the amount of funding as well as the transfer of power from the *Bundestag* as constitutional.¹³⁷ The Court, however, required the continual presence of the *Bundestag* in approving of current and future EU treaties.¹³⁸ In essence, by ensuring German democracy and a separation of powers, the BVerfG is allowing any constitutional challenge the possibility of trumping even *Bundestag* ratification of future EU treaties by virtue of Germany's role in the Eurozone as a contributor. This begs the question as to whether the BVerfG would continue to bless large scale EU treaties, albeit with stipulations as in the September 7 ruling,¹³⁹ even if the treaty should be permanent.

IV. THE PERMANENT SOLUTION THAT ALMOST DIED

A. *The Creation of the ESM*

On February 2, 2012, Eurozone Member States ratified the treaty that established the European Stability Mechanism ("ESM").¹⁴⁰ This mechanism, also called the "Pact for the Euro," was essentially designed to serve as a more permanent solution to the short-term fixes employed by the EFSM and EFSF, which

136. *Id.* at 1567–68 (indicating the Court approved the rescue packages funded by Germany, but placed limits on Germany's involvement).

137. *See id.* at 1567 (stating the bailouts did not excessively burden German's budget, nor did the bailouts result in a significant transfer of power from the *Bundestag*).

138. *See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sep. 7, 2011, Case No. 2 BvR 987/10, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS ¶ 128 (Ger.)* (stating that the "Bundestag must specifically approve every large-scale measure of aid of the Federal Government . . . on the international or European Union level").

139. *See Curzan, supra* note 5, at 1571 (reviewing the possible effects of the BVerfG's September 7 ruling on the ESM).

140. *See generally* Treaty Establishing the European Stability Mechanism, annex II, Feb. 2, 2012, T/ESM 2012-LT/en 1 [hereinafter TESM] (listing signing parties to the ESM); Jonathan Tomkin, *Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy*, 14 GERMAN L.J. 169, 171–72 (2013) (describing how the ESM was instituted by way of a third paragraph to Article 136 TFEU that allowed the Member States to create the permanent mechanism; this new mechanism was finally adopted on March 25, 2011 via European Council Decision 2011/199/EU).

were meant to expire in June 2013.¹⁴¹ The necessity for the ESM to deal with continuing escalation of problems accelerated its implementation.¹⁴² A significant departure from what the Eurozone had previously done was that the ESM allowed Member States to lend money directly, rather than merely guaranteeing loans as was done under the EFSF.¹⁴³ To facilitate the loans, seventeen Eurozone countries were to contribute €80 billion jointly.¹⁴⁴ Additionally, the Eurozone countries would have to be prepared to contribute an additional €620 billion should such funding be required.¹⁴⁵ To further strengthen its goals of bailing out countries and imposing austerity measures, the ESM sets out special protections for its creditors by giving them priority over other creditors, other than the IMF, which has preferred creditor status over the ESM.¹⁴⁶

Application for support from the ESM is made in a similar fashion to that of its predecessor, the EFSF. A Memorandum of Understanding will have to be submitted that details the exchange of loans for austerity measures as well as lays out the State's plan of progression towards financial stability.¹⁴⁷ The

141. See Ryvkin, *supra* note 11, at 233 (noting that the EFSF and EFSM were set to expire in June 2013); see also BARRETT, *supra* note 49, at 16 (*quoting* European Council 28–29 October Conclusions (EUCO 25/1/10 REV 1 EN, Brussels, 30 Nov. 2010), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117496.pdf) (stating that heads of state at the Brussels European Council of Oct. 28–29, 2010 asserted that a permanent solution was needed to “safeguard the financial stability of the euro area as a whole”); *EFSF Frequently Asked Questions*, *supra* note 125, at 4 (setting June 30, 2013 as the earliest date for the EFSF's liquidation, after which management and repayment of outstanding debt will continue but no new programs will be entered into).

142. See Tomkin, *supra* note 140, at 172 (noting the entry of ESM was accelerated to a year before it was intended to be implemented); see also Hofmeister, *supra* note 96, at 140 (noting the decision of the European Council to extend the EFSF indefinitely under a new form, the ESM, due to continuing market turbulence).

143. See Charles Forelle, *Europe Sets Pact on Bailout Fund*, WALL ST. J. (Mar. 22, 2011, 12:01 AM), <http://on.wsj.com/14KWVtW> (“The temporary vehicle relies on loan guarantees and didn't require the countries to put up any cash.”); see also EUR. FIN. STABILITY FACILITY, *supra* note 125, at 2–4 (noting that EFSF issues are guaranteed by Member States and describing the guaranty mechanism).

144. Forelle, *supra* note 143.

145. See *id.* (noting that Germany, France, Italy, and Spain were to bear the brunt of this much larger contribution).

146. See TESM, *supra* note 140, at pmbl.13 (detailing treatment of creditors).

147. See *Intergovernmental Support Mechanisms*, EUR. COMMISSION, <http://ec>.

instruments submitted in support of the application may vary on the State's needs and mutually agreed upon decisions between the State and the European Commission and ECB.¹⁴⁸ By maintaining the general framework of the EFSF with major changes to the new-found powers the ESM may exercise, the strength of the mechanism lies not only in its ability to maintain the liquidity of financially troubled states, but it also allows the will of the EU, as represented through the Commission, to have the final say in the ultimate implementation process. It seems more efficient to allow the Council, as heads of the respective States, to have a say in the agreement packages since their countries will be paying the bill.

The treaty, however, could only be implemented if Member States representing 90% of the fund's contributors ratified it.¹⁴⁹ This put Germany in a very powerful position, it being the biggest contributor to the ESM with 27% of the contribution commitment.¹⁵⁰ For the ESM treaty to become effective, it was necessary for Germany to ratify the treaty.¹⁵¹ The problem for proponents of the ESM then lay in the democratic processes that played out in the German State.¹⁵² The GG firmly states the proposition that the State's power flows from the people.¹⁵³ Although the legislative and executive branches are empowered to decide policy for the German State as well as the German role in the EU, it is for the BVerfG to ensure that the legislative branches do not infringe on the GG.¹⁵⁴

europa.eu/economy_finance/european_stabilisation_actions/esm/index_en.htm (last visited Feb. 5, 2015) (laying out the application process for financial assistance from the ESM).

148. *Id.*

149. TESM, *supra* note 140, art. 48(1).

150. *Id.* at annex I.

151. *See supra* notes 149–50 and accompanying text (making Germany's ratification of the treaty necessary to its implementation by virtue of the country's contribution to the fund).

152. *See* Mattias Wendel, *Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012*, 14 GERMAN L.J. 21, 21 (2013) (describing the initial legal challenge to the ESM in Germany).

153. GG, *supra* note 93, art. 20(2).

154. *See id.* art. 93(1) ("The Federal Constitutional Court shall rule: 1. on the interpretation of this Basic Law in the event of disputes concerning the extent of rights

The controversy, however, started with opposition from within Germany, concerning the perception of many that the ESM violated the TFEU's "no-bailout" clause.¹⁵⁵ Article 125(1) provides that:

The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.¹⁵⁶

This was accompanied by the perceived restrictions at the time dealing with financial assistance to Member States via TFEU Article 122(2), stating:

Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The president of the Council shall inform the European Parliament of the decision taken.¹⁵⁷

Discontent within Germany due to what was perceived as irresponsible bailouts prompted litigation in the BVerfG in an attempt to block the TESM.¹⁵⁸ Specifically, Article 125(1) was

and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body . . .").

155. See BARRETT, *supra* note 49, at 14 (discussing opposition in German public opinion regarding the idea of a transfer union considered blocked by the "no-bailout" clause).

156. Consolidated TFEU, *supra* note 45, art. 125(1).

157. *Id.* art. 122(2).

158. See BARRETT, *supra* note 49, at 15 (stating a number of German economists commenced litigation, arguing that the assistance to Greece and the euro fund rescue violated the TFEU "no-bailout" clause).

seen as a strong refusal to help fiscally irresponsible countries while Article 122(2) was seen to disallow a more automatic assistance method by ensuring a more nuanced approach to helping Member States in need.¹⁵⁹

Despite some discontent in Germany, which would ultimately lead to a Court battle in the BVerfG as elaborated below, the Council pushed through with the treaty change to create the ESM.¹⁶⁰ This was done by changing Article 136 of the TFEU to allow the establishment of the ESM as a permanent mechanism that will act as a safety net for the Eurozone.¹⁶¹ The change was made expediently by making use of the simplified amendment procedure allowed under Article 48(6) of the TEU.¹⁶² The actual work on the text of the ESM was done by the Eurozone finance ministers as well as the Commission.¹⁶³

V. LEGAL CHALLENGES

Opposition to the implementation of the ESM quickly arose in the form of judicial challenges. Because the legislative process seemed all but guaranteed, opponents of the treaty sought judicial relief in other Eurozone Member States.¹⁶⁴ This Comment will

159. *See id.* at 14 (discussing the no-bailout” clause as a constitutional guarantee against a “transfer union,” which would shift resources to less fiscally-responsible states, and Article 122(2) as allowing financial assistance to Member States who are affected by natural disasters or exceptional occurrences beyond their control).

160. *See id.* at 16 (stating the European Council President was invited to consult on a “limited treaty change,” and the Euro-area finance ministers agreed on the ESM to replace the EFSF, which would subsequently be reflected in a proposal submitted by the President).

161. *See id.* at 18 (“The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole.”).

162. *Id.*

163. *Id.* at 19.

164. *See generally* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 12, 2012, Case No. 2 BvR 1390/12 et al., ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (Ger.) ¶¶ 146–50, available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html [hereinafter German TESM ruling] (stating the claims brought within Germany by applicants challenging the constitutionality of the ESM); *Pringle v. Ireland*, [2012] IESC 47 (Ir.) [hereinafter *Pringle* Ruling] (discussing Mr. Pringle’s case against the Government of Ireland questioning the constitutionality and validity of the ESM and

first briefly review *Pringle's* procedural history, culminating in rulings by the ECJ. It will then review the BVerfG's ruling.

A. *Pringle: From Ireland to the European Court of Justice*

Thomas Pringle, an independent member of parliament, challenged the TESM in the Irish Court System.¹⁶⁵ Pringle sought a preliminary injunction from the Irish Supreme Court against the TESM by challenging its validity as “(a) a decision of the European Council proposing a Treaty amendment and (b) a Treaty entered into by the seventeen euro-area Member States of the European Union.”¹⁶⁶ On July 17, 2012, the High Court of Ireland dismissed Pringle's complaint.¹⁶⁷ Pringle appealed to the Irish Supreme Court, or *Cúirt Uachtarach na hÉireann* in Irish, which stayed certain proceedings until a preliminary ruling could be issued by the ECJ.¹⁶⁸ This was done to resolve the issues concerning EU law before the Irish Supreme Court should rule

whether Ireland ratifying the treaty would be incompatible with currently existing treaties). The *Pringle* case, in particular, made its way through the Irish Courts and eventually into the ECJ for certification of one of the three issues. *See id.* ¶ 3(ii) (stating the Court refrained from publishing its judgments until a final ruling by the Court of Justice, specifically regarding issues raised from the second argument).

165. *See Pringle Ruling, supra* note 164, ¶¶ 1, 6(i) (discussing Mr. Pringle, the appellant, as a member of Dáil Éireann, the Irish Parliament); *see also* Case C-370/12, *Pringle v. Ireland*, ECLI:EU:C:2012:756 [hereinafter ECJ Ruling] (noting Pringle's official title as a member of parliament).

166. *Pringle Ruling, supra* note 164, ¶ 6(i). Pringle also “initially challenged the validity of a Treaty” which the Irish Supreme Court recognized was passed in Ireland by popular referendum on May 31, 2012. *Id.*

167. ECJ Ruling, *supra* note 165, ¶ 26. Furthermore, “[a]lthough during the months prior to the entry into force of the ESM Treaty all eyes were on Germany, preliminary questions about the ESM did not reach the Court via the BVerfG. Instead, they originated in Ireland.” Vestert Borger, *The ESM and the European Court's Predicament in Pringle*, 14 GERMAN L.J. 113, 121 (2013).

168. *See Pringle Ruling, supra* note 164, ¶ 10(i) (“It was submitted that the issues of the EU law arising ought first to be referred to the Court of Justice, before this Court considered the constitutionality of the ESM Treaty.”). The Irish Supreme Court decided other issues pertaining solely to the relationship between its own Constitution and the TESM. *See id.* ¶¶ 3 (i), (iii) (discussing the first issue, which was whether the ESM Treaty involves an unconstitutional transfer of sovereignty, and the third issue, which was whether it was appropriate to grant an interlocutory appeal). However, this Comment is mainly concerned with the dissonance in approach between the Irish Supreme Court that referred issues of EU law to the ECJ and the BVerfG, which seemed to only be concerned with possible conflicts between the TESM and German Constitution.

on the ESM treaty.¹⁶⁹ The ruling was requested to receive clarification on three issues: (1) Whether the Council's decision¹⁷⁰ to amend Article 136 TEFU to establish a stability mechanism by way of the simplified revision procedure was valid insofar as it amounted to a conferral of competencies, conferred on the Union in the Treaties or whether the amendment's content violated the Treaties or general principles of Union law;¹⁷¹ (2) whether a Eurozone Member State, in accordance with the provisions of the TEU and TFEU, is entitled to enter into an international agreement such as the TESM,¹⁷² and (3) if the Council's decision is valid, then are Eurozone Member States' ability to enter into such international agreements as the TESM subject to the coming into force of that decision or may such agreements be entered into earlier?¹⁷³

The ECJ's rulings were issued as favorable to the TESM.¹⁷⁴ The European Court was of the opinion that inserting Article 136(3) TFEU, effectively creating the TESM, did not involve impermissible transfers of power that would enable the Union to do anything it could not do previously; the ESM complies with EU law.¹⁷⁵ The amendment to Article 136 was held not to affect the EU's monetary competencies because it was drafted to be subject to strict conditionality.¹⁷⁶ In this way, the ESM falls within the parameters of economic policy competence and coordination as

169. See *Pringle Ruling*, *supra* note 164, ¶ 3(ii) (stating issues arising out of the European Council decision and whether a member of the European Union would be entitled to ratify the ESM Treaty were adjourned until a ruling by the Court of Justice); see also Consolidated TFEU, *supra* note 45, art. 267 (providing the basis of coordination between the ECJ and national courts wherein the latter refers questions to the former on matters of European Union law for interpretation).

170. See European Council Decision 2011/199, 2011 O.J. (L 91) (amending Article 136 TFEU to create the ESM).

171. See ECJ Ruling, *supra* note 165, ¶ 28(1).

172. See *id.* ¶ 28(2) (listing the articles and provisions of the TEU and TFEU at issue regarding whether a Member State of the European Union is entitled to enter into and ratify the ESM Treaty).

173. *Id.* ¶ 28(3).

174. See *id.* ¶¶ 186(1)–(3) (laying out the ECJ's rulings on July 31, 2012 on the three issues referred to it by the Irish Supreme Court).

175. *Id.* ¶¶ 72–73.

176. ECJ Ruling, *supra* note 165, ¶¶ 52–53, 57, 69, 72–73.

authorized by Union law.¹⁷⁷ Basically, the Union does not gain any more powers via creation of the mechanism.

As to the second issue, the ECJ held that the Treaty provisions called into question do not prevent Eurozone Member States from entering into agreements such as the TESM.¹⁷⁸ Rather than stepping on the toes of the ECB by regulating Eurozone monetary policy, such as maintaining price stability, the ESM merely allows Member States to aid each other when one or more starts to fail financially.¹⁷⁹ The whole purpose of the mechanism is to raise funds to provide for financial stability.¹⁸⁰

Furthermore, the Irish Supreme Court sought to clarify whether the ESM was in breach of the no-bailout clause in the TFEU.¹⁸¹ The purpose of the no-bailout clause is to promote the consideration of fiscal responsibility among Member States when taking on debt.¹⁸² Because states are not barred from contributing aid on a need basis, the TFEU's no-bailout clause is not violated by the ESM; also, contributions are dependent on conditions.¹⁸³ Member States will remain liable for their own financial shortcomings.¹⁸⁴ Additionally, financial support is granted by the mechanism only in defense of the Eurozone as a whole rather than merely the onset of financial troubles for individual states.¹⁸⁵ Lastly, the Member States will not be liable for each other's capital calls to fund the mechanism.¹⁸⁶ Although revised capital

177. *Id.* ¶¶ 69, 72.

178. *See id.* ¶ 186(2) (listing the Treaty provisions called into question and holding that the Member States could enter into the TESM).

179. *Id.* ¶¶ 94–96, 110.

180. *See TESM, supra* note 140, art. 3, 12(1) (stating the purpose of the ESM shall be to mobilize funding and provide stability support under strict conditionality).

181. *See ECJ Ruling, supra* note 165, ¶ 129 (stating the referring court questioned whether the ESM Treaty breached TFEU Article 125).

182. *See id.* ¶ 135 (noting the prohibition ensures Member States will “remain subject to the logic of the market when they enter into debt,” prompting the States to maintain budgetary discipline, which will maintain financial stability).

183. *See id.* ¶¶ 136–37 (stating TFEU Article 125 does not prohibit Member States from granting financial assistance as long as it is necessary for the “safeguarding of the financial stability of the euro area as a whole and subject to strict conditions”).

184. *See id.* ¶¶ 138–39 (discussing that the recipient Member State will remain responsible for its financial commitments).

185. *Id.* ¶ 142.

186. *See ECJ Ruling, supra* note 165, ¶¶ 144–46 (stating Member States are not

calls will be made to other ESM members when one defaults, the defaulting member will still be liable for its ultimate share of the funding.¹⁸⁷

As to the third and final issue referred to the ECJ, the European Court ruled that Member States may ratify the TESM before enforcement of the Council decision.¹⁸⁸ The ECJ held that because the Council decision merely confirmed the power of the Member States to enter into such international agreements, that enforcement of the Council's decision provided no new powers.¹⁸⁹ Consequently, this last ruling justified that the power to create the ESM was already inherent in the TFEU, rather than arising from Article 136(3) TFEU itself.

While the Irish Supreme Court referred issues pertaining to the legality of the TESM to the ECJ, the German Court took another approach, calling into question the TESM's conflict with the GG. This falls in line with Germany's long standing approach of looking only to its GG when challenged with possible EU conflicts. Following is the ruling by the BVerfG on the validity of the TESM.

B. The Last Word: Enter the Bundesverfassungsgericht

While the German government was cooperating with the other Eurozone States in pushing for the ESM, a backlash was mounting from skeptics of the proposed changes on the steps of the Federal Constitutional Court.¹⁹⁰ On September 12, 2012, onlookers and the media were given a ruling following over thirty-seven thousand complaints that were filed with the BVerfG over German ratification of the ESM.¹⁹¹ The main challenge before the

liable for the capital calls of another Member State that receives stability support).

187. See *id.* ¶ 145 (discussing when there is a revised increased capital call to all other ESM Members, the defaulting ESM Member State is bound to pay its part of the capital, whereas the other ESM Members do not act as guarantors of the debt).

188. See *id.* ¶ 185 ("Consequently, the answer to the third question is that the right of a Member State to conclude and ratify the ESM Treaty is not subject to the entry into force of Decision 2011/199.").

189. *Id.* ¶ 184.

190. See Wendel, *supra* note 152, at 21 (discussing over 37,000 German citizen constitutional complaints filed against the ESM ratification).

191. *Id.*

Court was a petition for a temporary injunction that would block Germany from ratifying the Treaty.¹⁹² The German government feared that a ruling granting an injunction would turn back serious efforts at financial reform and further worsen economic stability within the Eurozone.¹⁹³ On the other hand, opponents of the treaty were worried that German democracy itself would be at stake as more competencies would be transferred to the EU.¹⁹⁴ The BVerfG was asked to order a temporary injunction to stop the ESM until either a referendum on the treaty or an amendment to the GG could be decided by the German people.¹⁹⁵ The pending case brought anxiety not just to those in Germany but to Europe and beyond as people became aware of how much power the German State really had.¹⁹⁶

The BVerfG was asked to rule on both the ESM and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (“TSCG”) as to whether or not a temporary injunction was proper.¹⁹⁷ The Court chose a unique approach to the legislation in question. Instead of applying a “mere ‘weighing of the consequences’” as was typical when dealing with temporary injunctions, and indeed asked for by opponents of the legislation,¹⁹⁸ the BVerfG decided to apply a “summary review.”¹⁹⁹

192. See German TESM ruling, *supra* note 164, ¶ 1 (noting that BVerfG was asked to issue a temporary injunction related to the ESM).

193. See Gavin Hewitt, *ESM in the Dock: Germany's Fears*, BBC NEWS (Sept. 10, 2012), <http://www.bbc.co.uk/news/world-europe-19542383> (reporting on the political, social, and economic climate surrounding the constitutional challenge to the ESM).

194. See *id.* (noting the perceived challenge to the principle that the German parliament has supreme authority).

195. See German TESM ruling, *supra* note 164, ¶ 1 (noting that BVerfG was asked to issue a temporary injunction related to the ESM); see also Wendel, *supra* note 152, at 22 (noting that a portion of the German population wanted the Court to “call for a referendum on the basis of Article 146”).

196. See Susanne K. Schmidt, *A Sense of Déjà Vu? The FCC's Preliminary European Stability Mechanism Verdict*, 14 GERMAN L.J. 1, 1 (2013) (remarking on the level of interest in the ESM case before the BVerfG).

197. See German TESM ruling, *supra* note 164, ¶ 1; see also Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union art. 1, Mar. 2, 2012, COUNCIL OF THE EUROPEAN UNION, available at <http://consilium.europa.eu> (detailing TSCG's goals of fostering budgetary discipline, strengthening coordination of economic policies and promoting sustainable growth).

198. See German TESM ruling, *supra* note 164, ¶ 166 (noting the complainants’

This allowed it to rule on the applications' probability of being successful.²⁰⁰ The implications of the constitutional review in this case would reach far across Europe and would have a direct effect on Germany as one of the Eurozone Member States.²⁰¹ The BVerfG did not want to take the chance of granting a temporary injunction when the outcome of further proceedings could reveal that the injunction was not warranted, thereby severely stifling the EU's mission to quickly and efficiently deal with the impending financial crisis.²⁰² On the other hand, it did not want to deny an injunction if there was a high probability that the treaty would be found unconstitutional.²⁰³ EU treaties, especially complex and highly integrated ones such as the ESM, are hard to "untangle" from existing legislation once they are ratified, especially those that affect huge portions of, supranational organizations, such as the Eurozone.²⁰⁴

1. *The September 12 Ruling*

In reviewing the case before it, the BVerfG concentrated on four major points of contention: the creation of the mechanism by way of amending Article 136 TFEU,²⁰⁵ ensuring the budgetary responsibility of the *Bundestag*, maintaining necessary access to information between the ESM and German Parliament, and maintaining German voting rights within the ESM.²⁰⁶ Inherent

belief that the weighing of consequences is necessary since the Treaty could be binding under international law).

199. Wendel, *supra* note 152, at 25.

200. *Id.*

201. *See id.* (implying that either the issuance or denial of a temporary injunction would have political and economic consequences within Germany and the EU as a whole).

202. *See id.* (implying that if the court issued a temporary injunction and blocked a legal ratification it could cause political and economic consequences within other Member States in the European Union).

203. *Id.*

204. *See id.* (noting that the long-term legal effects of ratification of the international law cannot be easily reversed).

205. *See* Wendel, *supra* note 152, at 27 (discussing the Court of Justice finding that Article 136(3) meets the conditions for ratification).

206. *See* German TESM ruling, *supra* note 164, ¶¶ 194, 208 (noting the budget autonomy of the German *Bundestag*, and discussing the right of citizens to elect the German *Bundestag* and the self-determination right for equal participation in German

in these rulings are two key *leitmotivs* (arguments) that this Comment will touch on as well.²⁰⁷

The first and foremost contention under judicial review challenged the addition of Article 136(3) to the TFEU.²⁰⁸ This effectively allowed the creation of the ESM by Eurozone Member States.²⁰⁹ The applicants challenged this amendment on the grounds that the Article largely negated the bailout provision in the TFEU.²¹⁰ Additionally, the applicants argued that too much German competence would be transferred to the ESM, leaving Germany at the mercy of those Member States who did not keep their own financial houses in order.²¹¹ Lastly, the applicants argue that the amendment to the TFEU makes such a radical change that the process should have conformed to the requirements under Article 48(2) TEU, and not have used the simplified procedure under Article 48(6).²¹²

The BVerfG's response was mixed but in favor of the Treaty.²¹³ The Court did not dispute that Article 125 TFEU bars Member States from incurring the liabilities of other Members.²¹⁴ Rather, Article 136(3) TFEU is interpreted to allow for the

authority).

207. See Wendel, *supra* note 152, at 32 (starting a discussion of three key arguments that stood out in the German TESM ruling).

208. See *id.* at 26 (noting that the first review deals with the approval of the “decision to insert a new Article 136(3) into the TFEU”).

209. See *id.* (noting that Article 136(3) allows Member States to “establish a stability mechanism . . . to safeguard the stability of the euro area”).

210. See German TESM ruling, *supra* note 164, ¶ 149 (noting that complainants argue Article 136(3) TFEU “largely devalues the bailout prohibition”); see also Consolidated TFEU, *supra* note 45, art. 125(1) (barring the EU from allowing Member States to be financially liable for other Member States).

211. See German TESM ruling, *supra* note 164, ¶ 149 (noting that this is a “fundamental change of monetary policy in the direction of a transfer and liability community”).

212. *Id.*; see also Consolidated TEU, *supra* note 44, art. 48(6) (laying out the procedure for amending Union treaties when that amendment does not transfer increased competencies to the Union); *id.* arts. 48(1)–(2) (laying out the procedure for amending Union treaties that either increase or reduce competencies to the Union).

213. See Wendel, *supra* note 152, at 27 (stating that “the German Federal Constitutional Court presents a mix of several, even slightly antithetical arguments”).

214. See German TESM ruling, *supra* note 164, ¶ 169 (reviewing the TESM, the Court does not dispute that Article 125 TFEU prohibits “assuming the liabilities of other Member States”).

creation of such mechanisms by which Member States may volunteer funding in order to facilitate an effective aid package.²¹⁵ The Court found that although the EMU as erected by the TFEU was in a great way altered, it did find that the “stability-oriented character” of the EMU remained.²¹⁶ The ESM, after all, was a coordinated way for Eurozone Member States to facilitate a quick and effective, as well as conditional, financial stabilizer to its Members’ troubled economies.²¹⁷ Finally, the Court held that the mere existence of Article 136(3) TFEU does not hinder in any way Germany’s budgetary responsibility; it merely allows for the creation of the ESM.²¹⁸

The BVerfG next dealt with the second major contention, which was in essence a materialization of the first, asserting that the principle of democracy rests in the budgetary responsibility of the *Bundestag*.²¹⁹ The idea of “budgetary responsibility” as a necessary principle of democracy was first established by the BVerfG in its *Lisbon* ruling.²²⁰ Article 79(3) of the GG protects it from any amendment that would restrict the democratic principles inherent in the *Bundestag* or *Bundesrat*.²²¹ Opponents

215. See Wendel, *supra* note 152, at 27–28 (noting that Article 136(3) opens up a possibility of Member States installing the mechanism on the basis of an international agreement, but at this time voluntary financial aid is within the scope of Article 125).

216. *Id.* at 28.

217. See German TESM ruling, *supra* note 164, ¶ 11 (“[T]he ESM may provide stability support to an ESM member.”).

218. See Wendel, *supra* note 152, at 28 (noting that “according to the Court, the introduction of Article 136(e) TFEU does not result in a loss of national budget autonomy,” but allows the Member States to create such mechanism).

219. See *id.* at 24 (noting that the plaintiffs in the September 12, 2012, case argued that the budgetary responsibility of the German *Bundestag* was violated); see also Karsten Schneider, *Yes, But . . . One More Thing: Karlsruhe’s Ruling on the European Stability Mechanism*, 14 GERMAN L.J. 53, 60 (2013) (detailing the BVerfG’s ruling on the importance of budgetary responsibility in the September 7 ruling also known as the Greece Bailout case, which was implicated by the ESM case).

220. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, Case No. 2 BvE 2/08 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (BVERFG) ¶ 256 (Ger.) (noting that the Basic Laws require approving the budget to be a responsibility of the legislature).

221. See GG, *supra* note 93, art. 79(3) (protecting the GG from unconstitutional amendments that would curtail Germany’s democratic institutions); see also *id.* arts. 20(1)–(2) (establishing Germany as a free and democratic state and vesting sovereign power in the people).

of the legislation claimed that by transferring financial competencies from the *Bundestag* to the ESM, given that the ESM is a permanent mechanism, German democracy would be eroded.²²² One of the fundamental democratic rights is the right to vote.²²³ That right is stifled if the *Bundestag* relinquishes its control over the budget, the idea being that future *Bundestags* will not be able to exercise their budgetary responsibilities as newly elected representatives of the German people.²²⁴ Specifically at issue were the financial transfers and liability obligations, as well as the monetary financing via the ECB.²²⁵ The ESM claimed to limit the sums contributed by each Member State to their agreed upon portion, for Germany, 27.1%.²²⁶ The fear, however, is that Member States were also liable should the situation arise where other Member State are not able to fulfill their obligations under the ESM.²²⁷ The BVerfG estimated that Germany's maximum burden was around €310 billion.²²⁸

In response to these fears, the BVerfG set a requirement that Germany could not be liable above its allotted contributory share without Germany's consent.²²⁹ This represented one of the most salient holdings of the Court.²³⁰ The German representative could allow for more funding but only upon authorization by the

222. See Schneider, *supra* note 219, at 57 (noting that complainants claim a sufficient erosion of subjective rights of budgetary autonomy).

223. See GG, *supra* note 93, art. 20 (stating that state authority emanates from the people through the exercise of voting in elections).

224. See Schneider, *supra* note 219, at 60 (detailing the concept of democracy regarding parliamentary budget responsibilities).

225. Schmidt, *supra* note 196, at 12.

226. See EUR. FIN. STABILITY FACILITY, *supra* note 125, at 25–26 (noting Germany's 27.1% contribution to the ESM); see also Schmidt, *supra* note 196, at 12 (“Article 8(V) TESM limits the financial obligations of participants ‘in all circumstances’ to the agreed sums . . .”).

227. See Schmidt, *supra* note 196, at 12 (stating a concern that Germany may be required to commit additional funds when other countries do not meet their financial obligations).

228. *Id.*

229. Wendel, *supra* note 152, at 29.

230. German TESM ruling, *supra* note 164, at Judgment ¶ 1 (holding that “no provision of the [TESM] may be interpreted in a way that establishes higher payment obligations for the Federal Republic of Germany without the agreement of the German representative”).

Bundestag.²³¹ This had a profound effect on the final adoption of the TESM, as the contracting parties to the Treaty issued an interpretive declaration in regards to Article 8(5) to clarify that Member States' liabilities would not exceed their expected contributions without consent of their representatives; this essentially instituted the requirements set down by the BVerfG.²³² The BVerfG was satisfied that this had the effect of solidifying Germany's power over its own contribution by making a one-time commitment with reservations to refuse to agree to future increases in monetary funding.²³³ By instituting the limitation requirement on future financial commitments, the BVerfG found that the TESM was constitutional in respect to the GG.²³⁴

The third major contention decided by the BVerfG dealt with the TESM provision restricting the flow of information.²³⁵ The applicants to the Court argued that Article 34 TESM hinders the flow of information between the ESM and Germany in contravention to Article 23(2) of the GG.²³⁶ Article 34 TESM bars anyone working on, or having worked on, the ESM from disclosing information subject to professional secrecy.²³⁷ The Court responded that it was "absolutely necessary" for the *Bundestag* to be informed.²³⁸ As stated by the applicants, this

231. See Wendel, *supra* note 152, at 36–37 (noting the *Bundestag* determines and controls activities of the German ESM representatives and new payment obligations require a constitutive approval of the *Bundestag*).

232. *Id.* at 30–31.

233. See *id.* at 29 (noting that the provisions of the TESM may only be applied in a way where Germany's liability cannot be increased beyond its share without consent).

234. See German TESM ruling, *supra* note 164, ¶¶ 253–54 (stating the Treaty does not violate the Basic Law as long as Germany "ensure[s] under international law an interpretation that is compatible with the Basic Law"); see also Wendel, *supra* note 152, at 28–30 (noting that according to the BVerfG, the TESM complies with German constitutional requirements related to budgetary responsibilities entrusted to the *Bundestag*, and discussing the BVerfG's requirement limiting all payment obligations of ESM Members under the Treaty to no higher than their capital contribution).

235. See German TESM ruling, *supra* note 164, ¶¶ 255–60 (discussing the ruling on the restriction of information concerning the ESM).

236. *Id.* ¶ 157.

237. See TESM, *supra* note 140, art. 34 (stating that professional secrecy applies to the Members and former Members of the Board of Governors and the Board of Directors, as well as anyone else associated with working for or in connection with the ESM).

238. German TESM ruling, *supra* note 164, ¶ 256.

right to information is indeed ingrained in the GG.²³⁹ The reasoning behind this was that the *Bundestag* must be fully informed on matters before it can make decisions so that it can be aware of the possible consequences.²⁴⁰

The Court laid down the legal justification by interpreting Articles 32(5), 34, and 35(1) of TESM as applying the professional secrecy obligation to third parties rather than Member States, who consequently are the ones responsible for the ESM.²⁴¹ The Court reasoned that although there might be some merit in preventing the release of information to third parties, such as those on the capital market, such information is actually key to the responsibilities of the German Parliament to make informed decisions.²⁴² Additionally, the BVerfG strongly solidified the rights of the German Parliament to receive information necessary to function, whether related to EU matters or not, by grounding those rights in the “eternity clause.”²⁴³ In order for Germany to ratify the TESM, it would have to do so with the stipulation that the *Bundestag* have the comprehensive information needed to make informed decisions and that this stipulation be “safeguard[ed] under public international law.”²⁴⁴ Therefore, Germany could only assent to the TESM if its provisions could be interpreted as consistent with the GG.²⁴⁵

239. GG, *supra* note 93, art. 23(2).

240. Wendel, *supra* note 152, at 37–38.

241. German TESM ruling, *supra* note 164, ¶¶ 255, 257; *see also* TESM, *supra* note 140, art. 32(5) (stating that all documents of the ESM are inviolable); *see id.* art. 34 (stating the obligations for professional secrecy); *see id.* art. 35(1) (granting immunity from legal proceedings to ESM staff members for their work performed in conformance with their official ESM duties, and stating they shall “enjoy inviolability in respect of their official papers and documents”).

242. *See* German TESM ruling, *supra* note 164, ¶ 257 (noting that preventing the release of information to unauthorized third parties should not prevent the *Bundestag* from receiving information).

243. *See* Wendel, *supra* note 152, at 39 (“The Court now—for the very first time—explicitly puts the essence of the parliamentary right to information under the protection of the eternity clause . . .”); *see also* GG, *supra* note 93, art. 79(3) (stating that this article forever enshrines certain rights in the German constitution that are unalterable).

244. Wendel, *supra* note 152, at 39.

245. *See* German TESM ruling, *supra* note 164, ¶ 259 (stating that ratification is only permissible if Germany ensures the Treaty is interpreted to guaranty the *Bundestag*

Lastly, the BVerfG dealt with the possibility of Germany losing its voting rights in the ESM.²⁴⁶ Article 4(8) TESM strips Member States of their voting rights in the ESM should those states fail to meet their financial obligations.²⁴⁷ The applicants argued that stripping Germany of its voting rights under the ESM would be an enormous blow to democracy.²⁴⁸ It would silence the *Bundestag's* say over policy and could potentially allow resolutions to be passed that could bind the German state in ways contrary to its own interests, effectively obstructing the *Bundestag's* budgetary responsibility.²⁴⁹ The Court conceded that the loss of voting rights would disable the *Bundestag's* ability to craft policy within the ESM.²⁵⁰ However, it ruled that the *Bundestag* must set aside its initial obligation in its budget as well as plan to meet any future payments that might be necessary as stipulated under the TESM.²⁵¹ Again, the Court invoked the loss of voting rights against Articles 38(1) and Article 20(1) and 20(2) as related to Article 79(3) of the GG in ruling that Article 4(8) TESM did not conflict.²⁵² Ultimately, the BVerfG was confident that the suspension in German voting rights was highly unlikely due to the *Bundestag's* ability to pay.²⁵³

receives information).

246. Wendel, *supra* note 152, at 29.

247. TESM, *supra* note 140, art. 4(8).

248. German TESM ruling, *supra* note 164, ¶ 156.

249. *Id.*; see also TESM, *supra* note 140, art. 5(1) (stating that each ESM Member State shall elect a Governor to the Board of Governors to vote in the ESM in accordance with their government's wishes); see *id.* art. 6(1) (stating that each ESM Member State shall also elect a Director to the Board of Directors to vote in the ESM in accordance with their government's wishes).

250. German TESM ruling, *supra* note 164, ¶ 266.

251. *Id.* ¶ 268.

252. *Id.* ¶ 267.

253. See *id.* ¶ 268 (stating that since the Bundestag is required to include Germany's share in the initial capital in the budget, and to ensure that Germany may always completely pay its further shares as required, a "suspension of the German voting rights can virtually be ruled out").

VI. IRELAND LOOKS TO EUROPE WHILE GERMANY LOOKS WITHIN

The role of the ECJ in the European Union is to interpret EU law and to ensure that each Member State applies it correctly within its borders.²⁵⁴ To avoid risks stemming from multiple, inconsistent rulings, Member States' national courts are to request the ECJ to issue preliminary rulings, the process that was followed in the *Pringle* case.²⁵⁵ This, however, is not the case in Germany. The BVerfG has a strong history of accepting and applying judicial review to most high profile EU treaties and amendments.²⁵⁶ Rather than consulting the ECJ, the BVerfG continually affirms its own strength by ruling on challenges to EU legislation based on its Constitution.²⁵⁷ As with the ESM case, the BVerfG has typically ruled EU legislation constitutional as long as it is interpreted to be consistent with the GG, rather than acknowledging EU law as supreme over German law.

Concerning the TESM, it is interesting, yet perhaps not practically meaningful, to look at how other Member State courts, such as Ireland's Supreme Court, rule on EU legislation. It is interesting because of the arguments made against such legislation and the Court's response can be informative. However, a final ruling from the Irish Supreme Court on measures such as the ESM might not be very influential outside of Ireland. As noted earlier, the TESM could only go into effect once Member States representing 90% of the contributory funds have paid in.²⁵⁸ Germany, a Member responsible for 27% of the funds, is an essential player.²⁵⁹ Should the BVerfG have ruled against the treaty, it would have been impossible to enact. Ireland, on the other hand, is responsible for paying in only 1.6% of the ESM

254. See EUR. UNION, *supra* note 64 (laying out the role of the ECJ).

255. See *id.* (stating that Member States are to ask for preliminary rulings so as to avoid inconsistent case law concerning EU law as applied across the Union); see also Borger, *supra* note 167, at 121 (stating that the Irish Supreme Court sought preliminary rulings from the ECJ).

256. See generally Scheuing, *supra* note 87, at 707–10 (outlining major BVerfG rulings on German constitutional challenges to EU legislation).

257. *Id.*

258. TESM, *supra* note 140, art. 48(1).

259. *Id.* at annex I.

funds.²⁶⁰ Should the Irish Supreme Court have ruled the TESM unconstitutional or invalid in breach of EU law, there is a good chance that the treaty would have still passed.

VII. CONCLUSION

The September 12, 2012 ruling by the *Bundesverfassungsgericht* did not set a groundbreaking precedent. It does seem that the Constitutional Court is continuing to tread a fine line between assenting to further European integration and maintaining its relevance as a court that rivals even the ECJ in many ways. This should not, however, allay the fears of EU proponents that the BVerfG will always consent to further legislation with perhaps a maximum of limitations and restrictions on proposed policy. As charged with the preservation of the democratic institutions of Germany, the BVerfG has the power to reign in democratically made decisions of the executive and legislative branches that it sees might in any way conflict with the GG. It is also noteworthy that while other European National Courts have referred questions to the European Court of Justice for interpretations on EU law, the German Court has almost never taken that route, preferring instead to interpret EU law in accordance with the German Constitution.²⁶¹

The very nature of the ESM as a financial rescue package may have sensitized the BVerfG to the impending dangers of blocking the Eurozone from passing legislation meant to protect the Member States' economies, Germany's included. Allowing Eurozone Member States to fail could cause a rippling effect, destroying the euro in its entirety. Because the German *Bundestag* had a right to protect its own interests as it becomes

260. *Id.*

261. One exception stands out. On January 14, 2014, the BVerfG referred issues for the first time ever to the ECJ. In that case, opponents of Outright Monetary Transactions sought to block the ECB from purchasing virtually unlimited government bonds of Member States for resale on secondary markets for the purpose of funding financial assistance programs. See *Bundesverfassungsgericht* [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 2728/13, Jan. 14, 2014, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (BVERFG) (Ger.) at II(a) (noting questions referred to the ECJ for a preliminary ruling). Regardless of how the ECJ rules, it is for the BVerfG to decide ultimately how they are going to apply the ruling: they can accept it or reject it. See *id.* ¶ 27 (stating that it is still the responsibility of the BVerfG to determine the ECJ interpretation's constitutionality).

even more integrated into the EU, the BVerfG seems to have tried its best to accommodate the former's decisions by reconciling the TESM to the level of constitutionality required for legislation to be in line with the GG.